



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1391-15

THE STATE OF TEXAS

v.

MIKENZIE RENEE RODRIGUEZ, Appellee

**ON STATE’S PETITION FOR DISCRETIONARY REVIEW
FROM THE ELEVENTH COURT OF APPEALS
BROWN COUNTY**

KELLER, P.J., filed a dissenting opinion.

A valid health-inspection search of a dorm room by agents of a private university uncovered contraband—illegal drugs. A university official called the university police, who came and seized the contraband. The student handbook of the university provides that duly authorized personnel of the university reserve the right to enter student rooms “at any time” for certain purposes, including “inspection for health, safety, or violation of University regulations.” Other passages in the university handbook highlight the possession of drugs as a violation of university regulations and the university’s policy of not tolerating drugs on campus. I would hold that the seizure did not violate the Fourth Amendment.

This case is similar to *Medlock v. Trustees of Indiana University*,¹ and any differences favor the State. In *Medlock*, the Indiana University handbook authorized health and safety inspections of dorm rooms by student inspectors.² The handbook required at least 24 hours’ written notice to the student before an inspection occurred.³ During an authorized inspection of Medlock’s room, student inspectors found a clear plastic tube that appeared to contain marijuana.⁴ One of the student inspectors called the Indiana University Police Department.⁵ The officers in this police department were real police officers, with the same powers as police officers employed by cities and towns.⁶ A university police officer—Christopher King—entered the room, looked at the tube, smelled marijuana, and left with the tube.⁷ The student inspectors continued their inspection and discovered a large marijuana plant in the closet.⁸ Officer King was summoned again, and he looked in the closet “and found himself face to face with a six-foot-high-marijuana plant.”⁹ At that point, Officer King left to get a warrant to search the room for more contraband and posted another police officer in the

¹ 738 F.3d 867 (7th Cir. 2013).

² *Id.* at 869.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 869-70.

⁸ *Id.* at 870.

⁹ *Id.*

room to make sure that no one moved or destroyed anything that might be contraband.¹⁰

Medlock was ultimately expelled from the school.¹¹ He filed a federal civil-rights lawsuit alleging, among other things, a Fourth Amendment violation.¹² Although the Seventh Circuit observed that the Fourth Amendment's exclusionary rule did not apply to student disciplinary proceedings, it stated that a violation of the Fourth Amendment would have entitled the student to money damages.¹³ "But," the Seventh Circuit concluded, "there was no violation."¹⁴

The court concluded that Medlock had contractually agreed to health inspections by university agents as a condition of living in his dorm room:

Medlock had consented in advance, as a condition of being allowed to live in the dormitory, to have his room searched for contraband and other evidence of violation of the health and safety code. He could have lived off campus and thus have avoided being governed by the code. He chose to trade some privacy for a dorm room.¹⁵

The student handbook did not purport to authorize searches by the police.¹⁶ Nevertheless, the court found that Officer King's seizure of contraband did not violate the Fourth Amendment. First, relying in part on *United States v. Jacobsen*,¹⁷ the court found that Medlock's expectation of privacy had already been frustrated by the search conducted by the student inspectors:

¹⁰ *Id.*

¹¹ *Id.* He was later readmitted. *Id.*

¹² *Id.* at 871.

¹³ *Id.* at 872.

¹⁴ *Id.*

¹⁵ *Id.* Alternatively, the court held that the search was a lawful regulatory search. *Id.*

¹⁶ *Id.* at 873.

¹⁷ 466 U.S. 109, 120-21 (1984).

What King saw the student inspectors had seen. The intrusion on Medlock's privacy was complete before King entered. And if this is wrong and a third person's glimpse of the incriminating scene could be thought an incremental intrusion, liability would be blocked by the venerable principle of *de minimis non curat lex*, which has been held applicable to a variety of constitutional settings.¹⁸

Second, the court stated that “reasonableness is the touchstone of the Fourth Amendment,” and that it was reasonable not to expect the student inspectors to seize the contraband themselves:

[O]fficer King was acting reasonably in backing up the student inspectors. They had entered Medlock's dorm room lawfully and a plain-view search had revealed marijuana. What were they to do? Remove the suspected marijuana from the room? But they are just students, and the university administration may not want its student inspectors to be seen in the hallways of the dorm carrying quantities of illegal drugs (especially a six-foot-tall marijuana plant) and drug paraphernalia, and may want their suspicions of possible criminal activity confirmed or dispelled forthwith by a police officer. It thus was sensible of the students to summon a university police officer to confirm their suspicion that they had found marijuana and other contraband and to remove the stuff.¹⁹

The Court says that the officers in *Medlock* “merely maintained the status quo while law enforcement secured a search warrant in good faith.” I disagree with that conclusion for two reasons. First, Officer King entered the dorm room without a warrant, and he did so, not just once, but twice. Second, before a warrant was obtained, the officer seized the tube of marijuana and carried it away with him.

There are cases in which a court held that the Fourth Amendment was violated by an entry by law enforcement officers who were invited into the residence by a landlord after the landlord had discovered contraband.²⁰ However, in at least two respects, the facts of the present case are more

¹⁸ *Medlock*, 738 F.3d at 873.

¹⁹ *Id.*

²⁰ See *State v. Johnson*, 110 Idaho 516, 521, 716 P.2d 1288, 1293 (1986) (“In the instant case, the suspected contraband was *not* turned over to the authorities; instead the landlord *invited* the

favorable to the State than the facts in *Medlock* and these other cases.

First, Howard Payne University (HPU) is private university. For this reason, I must disagree with the Court's contention that it would be unconstitutional for the university to require a student to give up Fourth-Amendment privacy rights as a condition of living in its dorms. HPU is not a state actor.²¹ If it wishes to require students who live in its dorms to give up some privacy rights under the Fourth Amendment, it has the right to do so. Although the student handbook required certain classes of students to live in on-campus housing,²² a student could have chosen to attend a different university. A student would just have to decide whether the educational value at HPU was worth any ensuing sacrifices in privacy that the university required while living in its dorms.

Although campus police officers may sometimes be state agents for Fourth Amendment purposes, because they have full authority to act as police officers under the law, they are also

officer to enter a private dwelling to observe the contraband first-hand. In this case, the suspected contraband was *not* in plain view; *and the landlord had neither personally seized nor delivered it to the police*. The *officer* had to *enter* the private dwelling in order to see it. The fact that the Fourth Amendment does not reach the landlord does not mean that the officer, a government official, is also immune from its sanctions simply because he accompanied the landlord.”) (emphasis in original; ellipsis omitted); *State v. Wright*, 221 N.J. 456, 476-77, 114 A.3d 340, 352 (2015); *People v. Brewer*, 890 P.2d 860, 862-63 (Colo. 1984). *See also Chapman v. United States*, 365 U.S. 610, 617 (“But it is clear that, before the officers made the forcible entry, the landlord did not know that the premises were being used for the [illegal] manufacture of liquor, nor had he exercised his statutory option to forfeit the tenancy for such a cause.”).

²¹ This means that, while the student inspectors in *Medlock* were state agents because the university in *Medlock* was a public university, 738 F.3d at 871, the same is not true in the present case.

²² This requirement applied to full-time, unmarried students who were between ages 17 and 22 who were not living with parents and who had not yet completed four full semesters or 60 credit hours.

employees of the university.²³ And that leads to the second aspect of this case that favors the State: The student handbook conferred broad authority on Howard Payne University personnel to enter rooms to inspect for a violation of university regulations:

Duly authorized personnel of HPU reserve the right to enter student rooms at any time for emergency purposes or for the purpose of maintenance, repair, and inspection for health, safety, or violation of University regulations.

Students are expected to maintain neat and orderly rooms. Periodically throughout the semester, Resident Directors and/or Resident Assistants will conduct health, hygiene, safety, and security checks in residence hall rooms.

As in *Medlock*, student inspectors were given authority to conduct inspection. But, in addition to that authority, the handbook also authorized “duly authorized personnel of HPU” to “enter student rooms at any time” to inspect for a “violation of University regulations.”

Needless to say, possessing illegal drugs was a violation of university regulations. Howard Payne made clear in the student handbook that illegal drugs would not be tolerated on campus or off campus and that the university would fully cooperate with law enforcement on such matters:

Howard Payne University prohibits the use of illegal drugs both on and off campus because they are detrimental to the physical, psychological, social, and spiritual well being of the individual. For the same reasons, the use or possession of alcohol on campus, at a University-sponsored event or trip, or in any manner that violates municipal, county, state, or federal law is prohibited. Abuses of substances also impede the student’s academic progress and thus work against the very purpose of the University. HPU intends to cooperate fully with the Federal Government, the State of Texas, and local authorities in the war against drug and alcohol abuse.

* * *

The University expects its students to obey the law. Therefore, a violation of alcohol or drug laws while admitted to the University, wherever that violation occurs, is a

²³ See TEX. EDUC. CODE § 51.203. The District of Columbia Court of Appeals has held that university police officers do not always act as state agents, and that they may be private actors when they serve as mere adjuncts to the actions of an administrator of a private university. *Limpuangthip v. United States*, 932 A.2d 1137, 1142-47 (D.C. App. 2007). For the reasons given below, I need not resolve whether HPU Officer Pacatte acted as a state agent or a mere agent of HPU.

violation of the University’s Student Conduct Code. Further, it is a violation of the University’s expectations for a student to drink, possess, or be impaired by drinking, alcoholic beverages, or to possess, use, or be under the influence of, illegal drugs or non-prescription hallucinatory drugs, on campus or at any event sponsored by the University or by a University-approved student organization.

Further, under the student handbook, the university reserved the right to require students to submit to drug testing:

Designated University officials reserve the right to require a student to show proof of a drug-free condition including drug testing whenever such officials suspect or have reasons to believe that a student might be engaging in drug use on or off campus. Reasonable suspicion for testing is to be determined by the sole discretion of University officials.

“Possession of drug paraphernalia” was one of many listed, nonexclusive grounds for requiring drug testing. The university also reserved “the right to use canine detection services whenever drugs are suspected on University property and are undetected by other means, as well as a deterrent to drug possession or use among students.”

Once the student inspectors discovered what appeared to be illegal drugs and drug paraphernalia, the clause in the student handbook regarding violations of university regulations became operable, as well as the university prohibition against drug use and the university’s avowed intent to cooperate with law enforcement. Howard Payne police officers, as employees of the university, were thus authorized to enter the room to seize the suspected drugs and drug paraphernalia found by the student inspectors.²⁴

I respectfully dissent.

Filed: June 7, 2017
Publish

²⁴ Whether a Howard Payne police officer could have conducted a physical search beyond what the student inspectors found, without a warrant, need not be decided here.